

UNITED STATES PATENT AND TRADEMARK OFFICE
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September 29, 2020

Opposition No. 91249427 (parent case)

Evolutionary Guidance Media R&D Inc.

v.

*Cyberman Security, LLC AKA The
CyberHero Adventures: Defenders of the
Digital Universe*

Opposition No. 91253845

*Cyberman Security, Inc. AKA The CyberHero
Adventures: Defenders of the Digital Universe*

v.

Evolutionary Guidance Media R&D Inc.

Mary Beth Myles, Interlocutory Attorney:

This matter comes before the Board on (1) Cyberman Security, LLC's ("Cyberman") motion, filed March 26, 2020, to "extend" the deadline for the close of discovery in Opposition No. 91249427, and (2) Evolutionary Guidance Media R&D

Inc.'s ("EGM") motion to suspend the proceeding in Opposition No. 91253845. Both motions are contested.¹

I. Motion to Extend in Opposition No. 91249427

Pursuant to the schedule set forth in the Board's institution order in Opposition No. 91249427, discovery closed on March 17, 2020. 2 TTABVUE 3. Inasmuch as Cyberman filed its motion on March 26, 2020, 8 TTABVUE, the motion is more properly characterized as a motion to reopen the discovery period. Accordingly, Cyberman must establish that its failure to act in a timely manner was the result of excusable neglect.² Fed. R. Civ. P. 6(b)(1)(B). *See also* TBMP § 509.01(b)(1) (2020).

In determining excusable neglect, the Board considers the following factors set forth in *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 395 (1993) and adopted by the Board in *Pumpkin Ltd. v. The Seed Corps*, 43 USPQ2d 1582, 1586 (TTAB 1997): (1) the danger of prejudice to the non-moving party; (2) the length of delay and its potential impact on the case; (3) the reason for the delay, including whether it was within the reasonable control of the moving party; and (4) whether the moving party has acted in good faith.

¹ Cyberman's motion to "extend" is single-spaced in contravention of Trademark Rule 2.126(a)(1). Cyberman should make sure that all future filings are double-spaced and otherwise comply with all applicable rules.

² EGM argues that Cyberman's motion must be characterized as a request to reopen discovery because Cyberman failed to serve its discovery requests early enough that the responses would be due no later than the close of discovery. 9 TTABVUE 5. This is incorrect. "While the Board encourages early service of discovery instead of reliance upon motions to extend the discovery period, a party wishing to serve discovery requests at a point in the discovery period when the last day for responding to the requests would fall after the close of discovery may seek an extension of the discovery period when appropriate **and if it can establish good cause** for the extension." *Trans-High Corp. v. JFC Tobacco Corp.*, 127 USPQ2d 1175, 1176-1177 (TTAB 2018) (emphasis in original). Rather, Cyberman's motion is subject to the excusable neglect standard **because it was filed after the close of discovery**.

The determination of whether a party's neglect is excusable is "at bottom an equitable one, taking into account all relevant circumstances[.]" *Pioneer*, 507 U.S. at 395; accord *FirstHealth of the Carolinas v. CareFirst of Maryland Inc.*, 479 F.3d 825, 81 USPQ 2d 1919, 1922 (Fed. Cir. 2007); *Pumpkin Ltd.*, 43 USPQ2d at 1584 n.2. Ultimately, the determination of whether or not a party's neglect is excusable lies within the discretion of the Board. *FirstHealth of the Carolinas*, 81 USPQ2d at 1921.

With regard to the first *Pioneer* factor, there is no evidence of prejudice to EGM, and none can be inferred under the circumstances. Prejudice under the first factor contemplates prejudice to the non-movant's ability to litigate the case due to, for example, the loss or unavailability of evidence or witnesses which otherwise would have been available. *Pumpkin Ltd.*, 43 USPQ2d at 1587; see also *Vital Pharm., Inc. v. Kronholm*, 99 USPQ2d 1708, 1710 (TTAB 2011). Regarding the fourth *Pioneer* factor, there is no evidence of bad faith on the part of Cyberman. These factors weigh in favor of a finding of excusable neglect.

With respect to the second *Pioneer* factor, namely, the length of delay and its potential impact on the proceedings, the Board must evaluate the total length of the delay caused by Cyberman's failure to meet the Board's deadlines, including the time for the Board to consider the instant motion. See *Pumpkin Ltd.*, 43 USPQ2d at 1588 (finding calculation of length of delay must include delay arising from time required for briefing and deciding the motion to reopen). The Board finds that the delay caused by Cyberman's failure to timely serve its discovery requests, and its motion arising therefrom, is minimal. Cyberman served its discovery requests on

February 19, 2020, and the responses were due on March 20, 2020, just three days after the close of discovery. Cyberman then moved to reopen the discovery period less than a week later, on March 26, 2020. This factor weighs in Cyberman's favor as it is a relatively short period of delay.

The Board now turns to the third *Pioneer* factor. Cyberman states that during the week of March 16, 2020, it requested a stipulation to extend the discovery deadline. 8 TTABVUE 2. EGM disputes this characterization, and states that Cyberman did not request EGM's consent to an extension until March 23. 9 TTABVUE 4, 9. The record supports EGM's representation, *id.* at 9, and demonstrates that Cyberman made no efforts to seek an extension of the discovery deadline until after it had passed. Nor does Cyberman offer any justification for why it did not serve its discovery requests at an earlier date.

However, Cyberman makes reference to the COVID-19 pandemic, and states that its counsel is located in New York, which was one of the epicenters of the pandemic in March 2020. 8 TTABVUE 4. While EGM argues that the pandemic would have had no effect on Cyberman's ability to timely serve discovery requests in February, 9 TTABVUE 5, the pandemic does coincide with the time period during which EGM informed Cyberman that it would be objecting to the discovery requests (March 16), *id.* at 4-5, and accordingly it could have prevented Cyberman from timely filing a motion before the close of discovery. On the whole, the Board finds that the third factor is neutral.

The Board must balance the factors enumerated by the Supreme Court in *Pioneer* to take into account all of the relevant circumstances in determining whether Cyberman has made a sufficient showing of excusable neglect. *See S. Industries Inc. v. Lamb-Weston Inc.*, 45 USPQ2d 1293, 1296 (TTAB 1997). In view of the absence of prejudice to EGM or bad faith on the part of Cyberman and the minimal length of the delay, the Board finds on the balance of the factors set forth in *Pioneer*, that excusable neglect has been shown. Accordingly, Cyberman's motion to reopen the discovery period is **granted**.³ EGM is allowed until **thirty days** from the date of this order in which to serve responses to Cyberman's discovery requests.⁴

II. Motion to Suspend in Opposition No. 91253845

EGM, the applicant in Opposition No. 91253845, moves to suspend that proceeding pending resolution of Opposition No. 91249427. 6 TTABVue. In support, EGM argues that the two proceedings involve the same parties and the same marks. *Id.* at 2. For the reasons that follow, the Board finds that judicial efficiency is served by consolidation, rather than suspension.

When cases involving common questions of law or fact are pending before the Board, the Board may order consolidation of the cases. *See Fed. R. Civ. P. 42(a); Regatta Sport Ltd. v. Telux-Pioneer Inc.*, 20 USPQ2d 1154 (TTAB 1991); and *Estate of Biro v. Bic Corp.*, 18 USPQ2d 1382 (TTAB 1991). In determining whether to

³ Additionally, as discussed below, the Board is resetting deadlines in these consolidated proceedings.

⁴ This allotment of time does not constitute an order to compel discovery but merely serves as a scheduling order.

consolidate proceedings, the Board will weigh the savings in time, effort, and expense that may be gained from consolidation, against any prejudice or inconvenience that may be caused thereby.

Consolidation is discretionary with the Board, and may be ordered upon motion granted by the Board, or upon stipulation of the parties approved by the Board, or upon the Board's own initiative. *See, e.g., Hilson Research Inc. v. Society for Human Resource Management*, 27 USPQ2d 1423 (TTAB 1993).

The parties to these proceedings are identical⁵ and the marks are identical or otherwise similar. Although Cyberman argues that the marks and claims are not identical, the Board finds that the proceedings involve largely common questions of law and fact. The marks and claims need not be entirely identical for consolidation to be appropriate and efficient. Accordingly, the Board orders consolidation of the above-captioned cases. The consolidated cases may be presented on the same record and briefs. *See Helene Curtis Indus. Inc. v. Suave Shoe Corp.*, 13 USPQ2d 1618 (TTAB 1989). Inasmuch as the Board is consolidating the proceedings, EGM's motion to suspend Opposition No. 91253845 is **denied**.

⁵ Opposition No. 91253845 names "Cyberman Security, Inc." rather than "Cyberman Security, LLC." However, Cyberman Security, Inc. alleges ownership of Application Serial No. 88219305, which is listed as owned by Cyberman Security, LLC. The remaining allegations support the conclusion that the parties are the same, and indeed both parties agree that the parties in the two proceedings are the same. *See* Opposition No. 91253845, 5, 6 TTABVUE. To the extent naming "Cyberman Security, Inc." in Opposition No. 91253845 was in error, Cyberman may request that it be corrected. *See* 37 C.F.R. § 2.102(b); *Custom Computer Services, Inc. v. Paychex Properties, Inc.*, 337 F.3d 1334, 67 USPQ2d 1638, 1640 (Fed. Cir. 2003).

The Board file will be maintained in Opposition No. 91249427 as the “parent case.” From this point on, only a single copy of all motions and submissions should be filed, and each submission should be filed in the parent case only, but caption all consolidated proceeding numbers, listing and identifying the “parent case” first.⁶

Despite being consolidated, each proceeding retains its separate character and requires entry of a separate judgment. The decision on the consolidated cases shall take into account any differences in the issues raised by the respective pleadings; a copy of the decision shall be placed in each proceeding file.

Upon consolidation, the Board will reset dates for the consolidated proceeding, usually by adopting the dates as set in the most recently instituted of the cases being consolidated. Dates are reset as follows:

Expert Disclosures Due	12/23/2020
Discovery Closes	1/22/2021
Pretrial Disclosures Due for Party in Position of Plaintiff in Opp. No. 91249427	3/8/2021
30-day Trial Period Ends for Party in Position of Plaintiff in Opp. No. 91249427	4/22/2021
Pretrial Disclosures Due for Party in Position of Defendant in Opp. No. 91249427 and in Position of Plaintiff in Opp. No. 91253845	5/7/2021
30-day Trial Period Ends for Party in Position of Defendant in Opp. No. 91249427, and in Position of Plaintiff in Opp. No. 91253845	6/21/2021
Pretrial Disclosures Due for Rebuttal of Party in Position of Plaintiff in Opp. No. 91249427 and in Position of Defendant in Opp. No. 91253845	7/6/2021

⁶ The parties should promptly inform the Board of any other Board proceedings or related cases within the meaning of Fed. R. Civ. P. 42, so that the Board can consider whether further consolidation is appropriate.

30-day Trial Period Ends for Rebuttal of Party in Position of Plaintiff in Opp. No. 91249427, and in Position of Defendant in Opp. No. 91253845	8/20/2021
Pretrial Disclosures Due for Rebuttal of Party in Position of Plaintiff in Opp. No. 91253845	9/4/2021
15-day Trial Period Ends for Rebuttal of Party in Position of Plaintiff in Opp. No. 91253845	10/4/2021
Opening Brief for Party in Position of Plaintiff in Opp. No. 91249427 Due	12/3/2021
Combined Brief for Party in Position of Defendant in Opp. No. 91249427 and Opening Brief as Plaintiff in Opp. No. 91253845 Due	1/2/2022
Combined Rebuttal Brief for Party in Position of Plaintiff in Opp. No. 91249427 and Brief as Defendant in Opp. No. 91253845 Due	2/1/2022
Rebuttal Brief for Party in Position of Plaintiff in Opp. No. 91253845 Due	2/16/2022
Request for Oral Hearing (optional) Due	2/26/2022

Generally, the Federal Rules of Evidence apply to Board trials. Trial testimony is taken and introduced out of the presence of the Board during the assigned testimony periods. The parties may stipulate to a wide variety of matters, and many requirements relevant to the trial phase of Board proceedings are set forth in Trademark Rules 2.121 through 2.125. These include pretrial disclosures, the manner and timing of taking testimony, matters in evidence, and the procedures for submitting and serving testimony and other evidence, including affidavits, declarations, deposition transcripts and stipulated evidence. Trial briefs shall be submitted in accordance with Trademark Rules 2.128(a) and (b). Oral argument at final hearing will be scheduled only upon the timely submission of a separate notice as allowed by Trademark Rule 2.129(a).

TIPS FOR FILING EVIDENCE, TESTIMONY, OR LARGE DOCUMENTS

The Board requires each submission to meet the following criteria before it will be considered: 1) pages must be legible and easily read on a computer screen; 2) page orientation should be determined by its ease of viewing relevant text or evidence, for example, there should be no sideways or upside-down pages; 3) pages must appear in their proper order; 4) depositions and exhibits must be clearly labeled and numbered – use separator pages between exhibits and clearly label each exhibit using sequential letters or numbers; and 5) the entire submission should be text-searchable. Additionally, submissions must be compliant with Trademark Rules 2.119 and 2.126. Submissions failing to meet all of the criteria above may require re-filing. **Note:** Parties are strongly encouraged to check the entire document before filing.⁷ The Board will not extend or reset proceeding schedule dates or other deadlines to allow time to re-file documents. For more tips and helpful filing information, please visit the [ESTTA help](#) webpage.

⁷ To facilitate accuracy, ESTTA provides thumbnails to view each page before submitting.